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IN THE

Supreme Court of the United States

October Term, 1962

No. **484**

JOSEPH GALLO,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No. .....

JOSEPH GALLO,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Joseph Gallo, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case as further described *infra.*

Citations to Opinions Below

The opinion of the Court of Appeals of the State of New York, printed in the appendix hereto, *infra,* pp. 4a-5a, is reported at 10 N. Y. 2d 1024, 225 N. Y. S. 2d 45. The opinion of the Supreme Court of New York, Appellate Division, 2d Dept., printed in the appendix hereto, *infra,* pp. 33a-34a, is reported at 14 A.D. 2d 556, 218 N. Y. S. 2d 1009.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 11, 1962 (Appendix,

infra, p. 1a). A motion for reargument or alternative relief, made pursuant to Rule XX (the Rule, which imposes no time limit for motions for reargument, is printed in the Appendix, *infra*, p. 36a) was filed May 21, 1962 in the Court of Appeals (the motion and supporting papers are printed in full in the Appendix, *infra* pp. 8a *et seq.*), and said motion was entertained by that Court and was denied by it on the merits on July 6, 1961 (Appendix, *infra*, p. 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since the petitioner is claiming rights, privileges or immunities under the due process provision of the Fourteenth Amendment of the Constitution of the United States.

Questions Presented

Petitioner, a much publicized figure in recent "Gangbuster" type of prosecutive activities in the City of New York, was convicted of coercion for allegedly telling one Supino that the latter's tavern would be picketed if a certain amusement machine were not put back in the tavern. Shortly prior to this conviction, the petitioner had been acquitted in another New York State prosecution under an indictment for conspiracy wherein the State's trial testimony covered, *inter alia*, the exact same alleged incident and charges of coercion as in the instant indictment and conviction, substantially the same source of evidence being used for this purpose by the State in both prosecutions. Petitioner's acquittal of the conspiracy charges came after a forty-four day trial. His subsequent conviction of the coercion charge—the case here sought to be reviewed—occurred after a one day trial. In this latter trial, where

petitioner was convicted of coercion, the state's witness above alluded to changed his prior conspiracy trial testimony on phases of the case which concededly were dispositive both in law and in fact, *viz.*, as to whether the allegedly threatened picketing had arisen in the setting of a labor-management situation rather than in a collateral or "secondary" type of setting which would import "coercion". Also, in this second trial, defense proof was excluded which would have established that the tavern owner was under a written contractual obligation to restore the amusement machine. The questions are:

1. Within the meaning of *Bartkus* v. *Illinois*, 359 U. S. 121, 127 and the concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 344 U. S. 424, 429, has the State of New York offended due process by the second prosecution of the petitioner on what amounts in every meaningful way to the identical charge after he has been acquitted of that charge?

2. Is the due process aggrievement suggested in question number 1 intensified by the way in which the State chose to make its case in the second prosecution, i.e., in view of the vital changes in the testimony of the State witness and the demand (granted and sustained by the State Courts) for exclusion of vital defense proofs (the written contract above referred to)?

3. Did the exclusion of the written contract violate petitioner's right to due process of law under the Fourteenth Amendment in that thereby he was denied the right of fair hearing and the right to make proper defense to a state charge of crime?

4. Did the Trial Court's refusal, in line with the exclusion of the contract as aforesaid, to charge the jury con-

cerning this contract, work a denial of due process of law in that thereby the Court refused to submit to the jury the theory of the defense?

5. Since the statute under which petitioner was convicted (N. Y. Penal Law §530) defines coercion in terms of compelling "another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing", and since the State introduced no evidence whatever in discharge of its burden to prove beyond a reasonable doubt this element of the alleged offense except undisputedly untrue evidence that no written contract existed, and since the undisputed evidence that such contract did exist was excluded as aforesaid, is this a case of violation of Fourteenth Amendment due process within the meaning of the "no evidence" doctrine of, e.g., *Thompson* v. *Louisville*, 362 U. S. 199, to the effect that due process requires some evidence which tends to prove the elements of the crime charged?

Statutes and Rules of Court Involved

The case involves New York Penal Law §530; and, as pertaining to the issue of this Court's jurisdiction, Rule XX of the Rules of Court of the Court of Appeals of the State of New York. The text of these provisions is printed in the Appendix hereto, p. 36a, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

(Our citations to the record will refer principally to the printed "Record On Appeal" in the Court of Appeals of

the State of New York, which is supplemented by the certified papers composing the record of the proceedings in the latter Court. The citation "R. App. " herein refers to the aforementioned printed Record on Appeal. Other record items to be cited will be suitably designated where they appear *infra*. At the time of filing of this petition for certiorari only the original of the aforementioned printed Record on Appeal is being filed in this Court; counsel is endeavoring to obtain nine additional copies of that printed Record on Appeal for the use of this Court, and if such prove to be obtainable they will be promptly transmitted to the Clerk of this Court.)

As intimated in the preface to our "Questions Presented", the instant prosecution against petitioner Joseph Gallo is one of those now-familiar "coordinated" prosecutive drives in the so-called "anti-racketeering" area. Moving against the petitioner in two separate County jurisdictions, the State of New York obtained against him the instant coercion indictment on May 26, 1959 in Kings County (R. App. 4-5, 8), and two days later (May 28, 1959) in Nassau County a conspiracy indictment (the State's proof under which was to include exactly the same incident and the same primary witness as in the substantive indictment) (R. App. 173-174, "Stipulation as to Exhibits").* Peti-

* The defense Exhibits relating to the Nassau County matter were stipulated to be handed up on argument before the State appellate Courts in the appeal from the coercion conviction, without being printed (R. App. 173-174). For reasons explained *infra*, these Exhibits were "for identification"; their exclusion from evidence (*infra*) was put in issue in the State appeals, and they were before the State appellate Courts. The contents of those Exhibits are undisputed, and we trust that we may refer to them in this petition without having filed them here at this time. A portion of one of those Exhibits is printed in the Appendix hereto, p. 35a, *infra*.

tioner was tried first under the conspiracy indictment in Nassau County, and after a trial of 44 days he was acquitted on all charges by the jury (Defendant's Exhibit D for identification, R. App. 173). Defendant's Exhibit E for identification (R. App. 174) shows that the State's proofs in the conspiracy trial did specifically cover the identical alleged incident which was the sole basis of the coercion case here sought to be reviewed.*

The acquittal of the petitioner in the Nassau County conspiracy case was on May 13, 1960 (Defendant's Exhibit D for identification, R. App. 173). On June 20, 1960 petitioner was brought to trial in Kings County on the instant coercion indictment (R. App. 13). State's witness Supino testified (R. App. 28 et seq.) that after he had ordered removal from his tavern of an amusement machine (of the "bowling" type) Joseph Gallo (the petitioner herein) came to the tavern (R. App. 32-33). Supino assumed that Gallo was "from the union" (*ibid*). Supino's statement on this point ("As far as I knew they were all from the union"—*ibid*), given on direct examination, confirmed subsequent testimony elicited by the defense that Supino was aware of visits in the immediately preceding days from union representatives who were trying to persuade Supino to restore the machine (*infra*). Supino, continuing, stated that Gallo said "Be a nice fellow and to put the machine back in again" to which Supino replied that this was impossible, whereupon Gallo said (according to Supino) "If we can't come to some kind of agreement we will have to put some pickets out

* Again, we respectfully call to the Court's attention our explanation in the preceding footnote concerning the contents of these defense Exhibits "for identification" and their non-inclusion in the Record filed with the instant petition.

(*ibid*). This, Supino stated, was "The only thing" Gallo said about pickets (*id.*, p. 36). On cross examination Supino in effect admitted that during the Nassau County trial he had told Gallo's counsel (Mr. Price) that he was "glad that the matter was over; that Jerry [Supino's manager] had told the truth that nothing had happened in [Supino's] place" (*id.*, p. 44); and that he (Supino) had never made any complaint to any police or prosecutive officers about the alleged incident (*id.*, pp. 44-46).

Efforts by the Prosecutor at the trial to get Supino to depict Gallo's alleged conduct or statements in some sort of more intimidating or terrorizing light proved completely abortive (*id.*, pp. 36-39), and instead, to the obvious discomforture of the Prosecutor, Supino "popped out" with the statement that the only thing he was "afraid of" was "You know, having trouble with the union and stuff like that" (*id.*, p. 38). It later developed also that, as previously indicated, Supino was specifically aware that the alleged visit from Gallo had been preceded by visits from "union officials" who came in to talk to Supino's manager "to try to straighten it out" (*id.*, p. 53). The prosecution did elicit from Supino that he himself had no union contract (*id.*, p. 32), but, as will appear, the "union" question had to do with maintenance of the amusement machine.

Persistent efforts by the prosecutor to milk from his witness Supino some kind of more inculpating testimony came to naught (*id.*, pp. 36-39; and see *id.*, pp. 47-48, 50-51).

Supino further testified that on the morning after Gallo's alleged visit two pickets appeared, but apparently they did not do very much "picketing", according to Supino's description, and they left after about one hour—apparently

as the result of a phone call made by Supino's attorney (*id.*, pp. 40-43). At the time of their arrival these "pickets" carried some kind of union sign bearing the legend "Local 266" (*id.*, p. 41).

Supino having denied expressly that he had any written contract with the operators or owners of the amusement machine, the defense introduced in evidence such a written contract (Def. Exh. B for identif., R. App. 173—printed in the Appendix hereto, *infra*, p. 37a), which the Court first admitted in evidence and then excluded (R. App. 53-54, 59, 61-66). The defense urged that this contract was material both on the issue of Supino's credibility (in denying that the had such a contract) and on the issue of proof of the statutory element of the offense of coercion (compelling "another person to do or to abstain from doing an act which such other person had a legal right to do or to abstain from doing"—Penal Law §530) (*ibid*). In excluding proof of this contract the Trial Court reasoned that it was "collateral", i.e., that it is coercion as a matter of law to threaten to put pickets in front of a business place to force compliance with a contract with another business concern (*id.*, pp. 62-66). In making this ruling the Trial Court evidently took away from the jury the question of fact as to whether the State had carried its burden of proof to show that no labor-management issue was involved (*e.g.*, *id.*, p. 65). In its charge to the jury the Trial Court went further and in effect instructed them that the issue of whether a labor-management question was involved was irrelevant (*id.*, pp. 157-160). (See also *id.*, p. 154).

The only other witness for the prosecution was Jerry Robinson, manager of Supino's tavern (*id.*, p. 71 et seq.). Robinson is that primary witness earlier mentioned who had testified in detail concerning the alleged incident at

the Nassau County conspiracy trial (Defendant's Exhibit E for identification, R. App. 174). Robinson in the instant trial testified that a union official named DeForté had come to Supino's tavern during the days immediately preceding the alleged Gallo visit—Supino at that particular juncture being away from the business because of illness—and that DeForte had spoken of the possibility of picketing the place if the amusement machine were not restored (*id.*, pp. 76-78, 81-91). Robinson stated that Gallo said he represented the "operators" or "association" i.e., the management rather than the labor interests in connection with the amusement machine (*id.*, p. 76, 92, 99-100). After testifying in this trial that Gallo had spoken of picketing Supino's tavern (*id.*, p. 74), Robinson then admitted on cross examination that he had said nothing about this in his extensive testimony in the Nassau County trial (*id.*, p. 95-96, 103-105); indeed, he admitted that at the time of the Nassau County trial he had stated to Gallo's attorney that Gallo had done nothing to be ashamed of, and Robinson stated in the instant trial that he still says this (*id.*, p. 106).

Although Robinson stated in the instant trial that there had been no union issue about servicing the amusement machine in question, his testimony in the Nassau County trial was directly to the contrary (R. App. 112, which should be contrasted with our Appendix hereto, *infra*, p. 35a, consisting of the pertinent excerpt of Robinson's Nassau County testimony).

During the Robinson testimony the Trial Court again applied its exclusionary ruling against allowing the aforementioned contract in evidence, or against allowing the witnesses to be questioned about it (R. App. 97-98, 106-107).

The Trial Court also denied a defense motion to dismiss the indictment on the ground of "double jeopardy" and "res judicata" based on the testimony and the acquittal in the Nassau County conspiracy case; the Court's reason for denying this motion was that conviction for the substantive crime of coercion is not precluded by acquittal of the crime of conspiracy (*id.*, 122-129).

Petitioner was convicted by the jury and was sentenced to an indeterminate term of up to three years (R. App. 172).

The Supreme Court of New York Appellate Division, 2d Dept., affirmed petitioner's conviction by the jury (R. App. 177). The Presiding Judge and one of the Associate Judges of the five-man Appellate Division wrote a dissenting memorandum—there being no opinion by the majority of the bench—(*id.*, 183). The ground of the dissent was that exclusion of the previously described contract was error, the dissenting Judges saying: "The evidence adduced as proof of the alleged coercion was obviously intended to prove that Supino had a legal right to remove the machine from his place of business because he was not required to keep it there by any contract. Hence, defendant should have been permitted to meet such proof by showing that there was such a contract" (*id.*, p. 184).

The Court of Appeals of the State of New York affirmed *per curiam* (Appendix hereto, *infra*, p. 4a).

As to how the federal questions are presented, we respectfully state as follows: At the trial (R. App. 122-129) and in the Appellate Division (Appellant's Brief, Point IV) the defense argued that the Trial Court's refusal to accept proof of former jeopardy, res judicata and collateral estoppel was error, the point as to former jeopardy being formulated (erroneously, we concede) as a direct issue of federal "former jeopardy" constitutionality. In the Court of

Appeals the "former jeopardy" point was formulated by the defense in the same concededly erroneous way (Appellant's brief, Point IV). The "former jeopardy" issue and the other federal questions which this petition brings forward were not, we concede, properly formulated in the requisite "federal" sense until the petitioner's Motion for Reargument in the Court of Appeals, which that Court, however, entertained and denied on the merits. Our Motion for Reargument, with supporting papers and brief, is printed in full in the appendix hereto, pp. 8a *et seq., infra;* the order of the Court of Appeals denying reargument is also printed in the appendix hereto, *infra,* p. 32a. The Motion for Reargument invoked the decisional rule which has been laid down by the Court of Appeals of the State of New York to the effect that it may entertain a motion for reargument on points as to which the Court's attention was "not drawn through * * * inadvertence of counsel", *Marine National Bank* v. *National City Bank,* 59 N. Y. 67, 73, citing *Mount* v. *Mitchell,* 32 N. Y. 702; *Fosdick v. Town of Hempstead,* 126 N. Y. 651. Rule XX of the Court of Appeals of the State of New York, which is the Rule concerning motions for reargument, imposes no time limitation within which such motions must be made. On the jurisdictional record here presented, it is submitted that this Court's jurisdiction may be exercised. *Department of Banking* v. *Pink,* 317 U. S. 264.

Reasons for Granting the Writ

1. We have previously referred to the disadvantageous position of a person like petitioner Joseph Gallo in the present day atmosphere of luridly publicized prosecution against the kind of alleged crime involved in this case. In

referring to these circumstances we have by no means gone outside the record; see the extremely provocative statements on the part of the prosecution in the sentencing minutes herein (R. App. p. 166 et seq.). The need for constitutional protection against short-shrift methods of criminal trial and conviction in such situations is one which especially should evoke the solicitude of this Court. This need is here most strikingly illustrated by the State's resort to the pattern of successive prosecutions which we have described. Not only was petitioner in effect tried a second time for the same offense after being first acquitted by a jury in a lengthy trial, but the testimony for the State was unabashedly changed on its second and successful try to put Joseph Gallo in prison for this same alleged offense. Issues looking to a defense akin to that of double jeopardy in a state prosecution for crime are cognizable under the Fourteenth Amendment due process clause on the basis of tests of the general fairness of state exercise of the power of criminal prosecution in such due process terms. See *Bartkus* v. *Illinois*, 359 U. S. 121, 127; *Palko* v. *Connecticut*, 302 U. S. 349; and the concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 344 U. S. 424, 429. In the *Bartkus* case, *supra*, the Court, citing the *Palko* case, *supra*, recognized that "at some point the cruelty of harassment by multiple prosecutions by a State would offend due process". In the *Brock* case, *supra*, Justice Frankfurter said (p. 429), "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted * * *"

While it is true that the charge on which Joseph Gallo was acquitted in Nassau County was for conspiracy rather than the substantive offense of violation of Penal Law § 530

which is involved in the instant prosecution, it is submitted that the Fourteenth Amendment issue of State prosecutive harassments is nevertheless properly presented within the meaning of the *Bartkus*, *Palko* and *Brock* cases cited *supra*.

In any event, where a defendant is inconsistently convicted and acquitted, or *vice versa*, on charges of substantive crime and conspiracy, it has been authoritatively declared that the record should be closely examined for injustice. See *Manley* v. *United States*, 238 F. 2d 211, 222 (C. A. 6, 1956), where the Court, while conceding that such inconsistent verdicts standing alone would not justify reversal, went on to say:

> "* * * but, when an obviously inconsistent verdict as to different Counts * * * is returned by the jury, both the Trial Court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

It is submitted that the salutary rule of the *Manley* case, *supra*, suggests, by compelling analogy, the need to be "extraordinarily careful to scrutinize the record" for the potentiality of a violation of Fourteenth Amendment due process whenever a defendant in State criminal proceedings is subjected to multiple or successive prosecutions for what in all true essence amounts to the same offense; and that this analogy is not less compellingly appropriate to our case merely because the inconsistent verdicts occurred in separate prosecutions for the conspiracy and substantive offenses, but that this latter circumstance renders the analogy all the more compelling by reason of the double jeopardy features of the situation.

2. On the face of the statute under which petitioner was convicted (Penal Law § 530—Appendix hereto, *infra* p.

36a), it was a question of fact for the jury as to whether the complaining witness had "a legal right" to put the amusement machine out of his premises. If there was a binding, existing contract which obligated the complaining witness to keep the machine in his premises, that fact was material to the question of whether the petitioner was guilty of "coercing" the complaining witness "to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing" (P. L. § 530). The Trial Court's exclusion of the aforesaid contract deprived petitioner of his Fourteenth Amendment right to a fair hearing and to make proper defense to the State charge for which he was on trial. *E.g., Frisbee v. Collins*, 342 U. S. 519; *Williams* v. *New York*, 337 U. S. 241; *Cole* v. *Arkansas*, 333 U. S. 196.

The disposition which the State Courts here made of this issue of the exclusion of the contract cannot be said to rest on "an adequate State ground". That is, the Federal constitutional issue which we herewith tender on this score cannot be avoided by reasoning that the highest Court of the State of New York has in effect construed Penal Law § 530 as allowing a conviction for coercion upon proof of "collateral" picketing threats wholly irrespective of whether the person allegedly threatened or coerced had a right to do or to abstain from doing the act in question. The mere *per curiam* affirmance by that Court (or by the Appellate Division) may not be so construed. In any event, the issue cannot be reasoned in that way under the present record—even if the virtual judicial repeal of the statute thereby entailed were to be taken as an accomplished fact. For here the jury was called upon to decide, among other things, whether the petitioner-defendant had threatened picketing at all as a matter of fact, or whether instead the complaining witness was confusing the petitioner's state-

ments with those of the labor union representatives whose visits had undisputedly preceded his; and on this factual issue of whether the petitioner had threatened picketing it was important to the defense that any and all evidence which might help in persuading the jury that the petitioner would not have been likely to make any such threat should be admitted for the jury's consideration; which in turn meant that, if the jury knew of the existence of the excluded written contract between the complaining witness and the operators or owners of the amusement machine, they might well be far less inclined to resolve against petitioner the factual issue of whether he had made any picketing threats, or whether he was speaking for management's contractual interest exclusively (as the defense urged) and, therefore, whether he had merely (as the defense urged) asked the complaining witness to abide by his written contract.

It is therefore submitted that the federal issue above suggested, as to whether exclusion of the contract deprived the petitioner of his Fourteenth Amendment right to a fair hearing and to make proper defense to the state charge for which he was on trial, is properly presented on the present record and strongly merits this Courts intercession.

Further, the Trial Court's exclusion of the contract as aforesaid, and its foreclosing of the contractual issue in its charge to the jury, make it relevant to recall the fundamental rule that a defendant in a criminal prosecution is entitled to a proper jury instruction presenting his theory of the case. *Calderon* v. *United States*, 279 Fed. 556, 558 (C.C.A. 5, 1922):

> "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to

make any charge on such theory. *Bird* v. *United States,* 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570; *Hendrey* v. *United States,* 233 Fed. 5, 18, 147 C.C.A. 75; *Liner* v. *State,* 124 Ala. 1, 7, 27 South 438; *Banks* v. *State,* 89 Ga. 75, 14 S. E. 927. * * *"

See also *Levine* v. *United States,* 261 F. 2d 747 (C.A.D.C. 1958) (collecting the authorities).

3. On the face of the statute under which petitioner was convicted (Penal Law §530—Appendix, *infra,* p. 36a), it was part of the burden of proof of the prosecution, as one of the statutory elements of the offense, to negate that the complaining witness had a "legal right" to remove the amusement machine or to refrain from restoring it at the request of a party acting under a right of contract. The complete absence of any evidence for the prosecution on this issue, taken together aggravatingly with the exclusion of the contract proffered by the defense, made this a case of "no evidence" of guilt such as to bring into operation the protection of the Fourteenth Amendment within the meaning of *Thompson* v. *Louisville,* 362 U. S. 199. See also 80 A.L.R. 2d 1368.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

DAVID F. PRICE,
Counsel for petitioner.

PRICE and IOVINE,
of counsel.

APPENDIX

Amended Judgment Appealed From
[Court of Appeals, State of New York]

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of January in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*
Remittitur January 11, 1962

No. 332

THE PEOPLE &c.,

Respondent,

vs.

JOSEPH GALLO,

Appellant.

BE IT REMEMBERED, That on the 5th day of October in the year of our Lord one thousand nine hundred and sixty-one, Joseph Gallo, the appellant in this cause, came here unto

the Court of Appeals, by Price & Iovine, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joseph A. Iovine, of counsel for the appellant, and by Mr. Aaron E. Koota, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there were presented and passed upon questions under the Constitution of the United States, viz.: Appellant contends that, upon this prosecution for the crime of coertion, the trial court's refusal to accept proof of his acquittal of the crime of conspiracy in Nassau County, in support of his plea of former jeopardy, violated his constitutional rights "under the Fifth Amendment" and deprived him of due process of law under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that prior acquittal of the crime of conspiracy was not a bar to prosecution or conviction of the crime of coertion in Kings County and that there was no violation

Amended Judgment Appealed From
[Court of Appeals, State of New York]

or deprivation of appellant's constitutional rights. [See 10 N Y 2d 1024].

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Kings County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Kings County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 11, 1962.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

Opinion of Court of Appeals of State of New York

10 N.Y.2d 1024, 225 N.Y.S.2d

THE PEOPLE, etc., Respondent, v. JOSEPH GALLO, Appellant.

Court of Appeals of New York.

Jan. 11, 1962.

Appeal from Supreme Court, Appellate Division, Second Department, 14 A.D.2d 556, 218 N.Y.S.2d 1009.

The defendant, who allegedly coerced prosecuting witness to keep pinball machine, was convicted in the County Court, Kings County, of coercion in violation of Section 530 of the Penal Law, Consol.Laws, c. 40, and was sentenced to serve an indeterminate term in the New York City Penitentiary, and he appealed.

The Appellate Division affirmed the judgment without opinion. Nolan, P. J., and Kleinfeld, J., dissented and voted to reverse the judgment and grant a new trial, on ground that when prosecuting witness was permitted to testify that he had no contract which required him to keep pinball machine on his premises, and such testimony was intended to prove that prosecuting witness had a legal right to remove the pinball machine from his place of business, the defendant should have been permitted to show that there was such a contract.

The defendant appealed to the Court of Appeals, contending that the exclusion of the contract was material error, and that the defendant's guilt was not established beyond a reasonable doubt, and that defendant did not have

a fair trial, and that refusal to accept proof of former jeopardy, res judicata and collateral estoppel was material error.

Price & Iovine, Brooklyn (David F. Price and Joseph A. Iovine, Brooklyn, of counsel), for appellant.

Edward S. Silver, Dist. Atty., Kings County (Aaron E. Koota, Asst. Dist. Atty., of counsel), for respondent.

Judgment affirmed.

All concur.

Order Amending Remittitur of Court of Appeals, State of New York

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of February A.D. 1962.

PRESENT, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 159

THE PEOPLE &c.,

Respondent,

vs.

JOSEPH GALLO,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and passed upon questions under the Constitution of the United States, viz.: Appellant contends that, upon

Order Amending Remittitur of Court of Appeals, State of New York

this prosecution for the crime of coercion, the trial court's refusal to accept proof of his acquittal of the crime of conspiracy in Nassau County, in support of his plea of former jeopardy, violated his constitutional rights "under the Fifth Amendment" and deprived him of due process of law under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that prior acquittal of the crime of conspiracy was not a bar to prosecution or conviction of the crime of coercion in Kings County and that there was no violation or deprivation of appellant's constitutional rights. [See 10 NY 2d 1024].

AND the County Court of Kings County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[Seal]

Notice of Motion, Motion and Affidavits for Reargument or Alternative Relief, and Brief in Support Thereof to the Court of Appeals of State of New York

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH GALLO,

Defendant-Appellant.

Notice of Motion for Reargument or, in the Alternative, for Modification, Clarification and Amendment of Judgment and Decision

To Edward S. Silver, Esq., District Attorney, Kings County, New York:

PLEASE TAKE NOTICE that, on June 11th, 1962, at 2 p.m. or as soon thereafter as counsel can be heard, the undersigned will move before the Court of Appeals of the State of New York, in Albany New York, for reargument of the above entitled appeal; or, in the alternative, for modification, clarification and amendment of the judgment and

decision therein. The undersigned will rely upon the printed motion, affidavits and brief annexed hereto.

PRICE & IOVINE,
Attorneys for
Defendant-Appellant-Movant,
Joseph Gallo,
66 Court Street,
Brooklyn 1, New York.

Motion for Reargument or, in the Alternative, for Modification, Clarification and Amendment of Judgment and Decision

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH GALLO,

Defendant-Appellant.

To the Court of Appeals of the State of New York:

JOSEPH GALLO, the defendant-appellant in the above entitled cause, respectfully moves this Court (1) to grant

him reargument of his appeal in said cause which was decided by this Court on January 22, 1962 (in which appeal this Court has heretofore amended the remittitur on February 22, 1962); and, if such reargument is denied, or if it is granted and does not result in a reversal of the judgment appealed from, (2) to grant him a clarification and modification of the judgment and decision of this Court in said appeal with appropriate amendment of said judgment and decision embodying such modification and clarification as is hereinafter more specifically prayed.

The grounds of this motion, as further set forth in the affidavits and the brief filed herewith in support of said motion, are:

1. Through the inadvertence of counsel, this Court's attention in the appeal herein was not drawn in an appropriate or effective manner to the issues presented by Point IV of the defendant-appellant's brief in the aforementioned appeal in this Court. Appellant's said Point IV related to the matter of the refusal of the Trial Court to accept proof of former jeopardy, *res judicata* and collateral estoppel in connection with certain proceedings against the appellant in Nassau County in which the appellant was acquitted under a charge of conspiracy, all of which is more fully set forth in said Point IV of appellant's aforementioned brief. Through the inadvertence of counsel, appellant's said Point IV in his brief on appeal in this Court did not refer to the Fourteenth Amendment of the Constitution of the United States and did not invoke that Amendment as a ground for reversal of the Trial Court's aforesaid refusal to accept

proof of former jeopardy, etc. as above recited. This failure of counsel to invoke the Federal Fourteenth Amendment represented a failure on counsel's part to discern that in a case of asserted *state* double jeopardy (as distinct from *federal*), issues looking to a defense of double jeopardy become cognizable under the Constitution of the United States only *via* the Fourteenth Amendment of said Constitution (not through the Fifth Amendment), and that the Federal cognizability of such issues arises on the basis of tests of the general fairness of State exercise of the power of criminal prosecution in general Fourteenth Amendment terms, rather than on the specific or direct basis of any asserted State violation of any Federally guaranteed right against State double jeopardy as such. This inadvertent failure of counsel to formulate properly the Fourteenth Amendment issue in appellant's brief on appeal in this Court was not remedied by counsel's subsequent motion for amendment of the remittitur of this Court. The purpose of said motion for amendment of the remittitur was to import upon the face of the record a certification or declaration by this Court that the Fourteenth Amendment issues above described were presented and ruled upon by this Court. However, this purpose is believed not to have been effectively accomplished by the aforesaid motion to amend the remittitur and by the granting of said motion. Such non-accomplishment of counsel's purpose was owing entirely to the antecedent and then-continuing inadvertence of counsel in not expressly briefing Fourteenth Amendment issues in this Court. A reading of this Court's order of February 22, 1962, amending the remittitur as aforesaid,

makes it clear that this Court was fully cognizant—as counsel, unfortunately, was not—that notwithstanding counsel's motion for amendment of the remittitur, the Fourteenth Amendment issue had not actually been expressly presented to this Court in the appeal, and that the amendment of the remittitur did not certify that the Court had expressly ruled on any such Fourteenth Amendment issue in said appeal. Now that counsel, thanks to the advice of other counsel who were engaged to advise as to the procedure for further review of this cause in the Supreme Court of the United States, are at length in a position to perceive clearly the framework of the Fourteenth Amendment issue in regard to appellant's aforementioned defense of State double jeopardy, etc., appellant does most respectfully move and petition this Court to relieve him of the disadvantage incurred by him owing only to the inadvertence of his counsel, in regard to the prior failure of his said counsel to present to this Court properly and effectively the aforementioned issues of Federal Constitutional right, and to relieve him of the consequent impairment of his right to seek Federal review in the Supreme Court of the United States. Appellant would also respectfully emphasize, upon the advice of his counsel who, as stated, are now better apprised of the framework of the Federal Constitutional issue than they were at the time of the appeal herein, that the branch of this action which seeks reargument is being presented to this Court by no means only with a view to ultimately possible Federal review, but is being presented also in all earnestness as a *bona fide* application to this Court to reconsider appellant's appeal on its true legal

merits irrespective of any further review proceedings which appellant might seek to pursue in the Supreme Court of the United States.

II. On the same basis set forth under the above stated ground "I", i.e., on the same basis of the inadvertence of counsel, it is submitted as a second ground of this motion that this Court's attention in the appeal herein was not drawn in an appropriate or effective manner to the issues presented by Point I of the appellant's brief in the aforementioned appeal in this Court. Appellant's said Point I related to the Trial Court's exclusion of a contract between the appellant and the accusing witness, by reason of which exclusion appellant urged that the crime of coercion (Penal L. § 530) was not proved against him. Through the inadvertence of counsel, appellant's said Point I in his brief on appeal in this Court did not refer to the Fourteenth Amendment of the Constitution of the United States as affording protection to the appellant against such exclusion of the aforesaid contract, i.e., appellant's brief did not urge that thereby he was denied the Fourteenth Amendment due process right of fair hearing and to make proper defense to a State charge of crime—all of which is further set forth in appellant's brief in support of this motion. This issue was not presented to this Court in appellant's aforementioned prior motion to amend the remittitur.

III. On the same basis set forth under the above stated grounds "I" and "II", i.e., on the basis of the inadvertence of counsel, it is submitted as a third ground of this motion that this Court's attention in the appeal herein was not

drawn to the Fourteenth Amendment aspect of the issues presented by Point II of appellant's brief in the aforementioned appeal in this Court. Appellant's said Point II urged that as a matter of law the guilt of the appellant was not established beyond a reasonable doubt; and the evidence of such alleged guilt was analyzed to demonstrate that it was wholly non-probative of guilt. But for the inadvertence of counsel, appellant's said Point II would have urged that this is a case of "no evidence" of guilt such as to bring into operation the protection of the Fourteenth Amendment within the meaning of the cases cited in Point III of appellant's brief filed in support of this motion. This issue was not presented in the prior proceeding herein for amendment of the remittitur.

WHEREFORE, it is respectfully prayed that this motion for reargument should be granted; and that, if such reargument is denied or if it is granted and does not result in a reversal of the judgment appealed from, that the alternative branch of this motion should be granted, viz., that the judgment and decision of this Court in the appeal herein which was decided January 22, 1962 should be clarified, modified, and amended, so as to state in words or substance the following: That clarification, modification and amendment of this Court's judgment and decision of January 22, 1962, are ordered, adjudged and decreed by adding thereto that, in the proceedings on this motion for reargument or alternative relief there were presented by appellant for the first time, in an express manner effective to raise the issue appropriately in this Court, and there were entertained and

passed upon by this Court, questions under the Constitution of the United States which were not so presented in the appeal decided January 22, 1962 or in the proceedings for amendment of the remittitur decided February 22, 1962; and that, in the proceedings on this motion for reargument or alternative relief, (1) appellant now expressly contends for the first time that upon this prosecution for the crime of coercion the Trial Court's refusal to accept proof of his acquittal of the crime of conspiracy in Nassau County deprived him of due process of law under the Fourteenth Amendment of the Federal Constitution within the meaning of *Bartkus* v. *Illinois*, 359 U. S. 121, 127 and *Brock* v. *North Carolina*, 344 U. S. 424, 429 (concurring op.), and the Court of Appeals, entertaining and passing upon said contention, hereby holds that the prosecution and conviction of the appellant in Kings County for the crime of coercion did not deprive the appellant of liberty without due process of law in violation of the Fourteenth Amendment of the Federal Constitution within the meaning of said decisions of the Supreme Court of the United States, notwithstanding appellant's prior acquittal of the crime of conspiracy in Nassau County; (2) appellant now contends for the first time that the Trial Court's exclusion of a contract between the appellant and the accusing witness in the appellant's trial for coercion under N. Y. Penal Law § 530 deprived the appellant of his Federal Fourteenth Amendment due process right of fair hearing and opportunity to make proper defense to a State charge of crime, and the Court of Appeals, entertaining and passing upon said contention, hereby holds that the appellant was not thereby deprived of any rights

under said Fourteenth Amendment; and (3) appellant now contends for the first time that there was "no evidence" of his guilt of coercion under P.L. § 530 so that his conviction of that crime deprived him of his rights under the Federal Fourteenth Amendment, and the Court of Appeals, entertaining and passing upon said contention, hereby holds that the appellant was not thereby deprived of any of said Federal Fourteenth Amendment rights.

Respectfully submitted,

PRICE & IOVINE,
Attorneys for appellant-movant
Joseph Gallo
66 Court Street
Brookyn 1, N. Y.

DAVID F. PRICE,
JOSEPH A. IOVINE,
Of Counsel.

Notice of Motion, Etc., to the Court of Appeals of State of New York

Affidavit of David F. Price in Support of Motion for Reargument or Alternative Relief

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH GALLO,

Defendant-Appellant.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

DAVID F. PRICE, being first duly sworn, deposes and says:

1. I am a member of the firm of Price & Iovine, attorneys for Joseph Gallo, the defendant-appellant in the above entitled appeal, and the movant herein. I make this affidavit in support of said Joseph Gallo's motion for reargument or for modification, clarification and amendment (see motion and brief filed herewith).

2. I aver that, as recited in the motion herewith, it was through the inadvertence of myself and of my associate, Joseph A. Iovine—our firm of Price & Iovine having been the attorneys for Joseph Gallo at all times pertinent hereto —that the several Points of argument in Joseph Gallo's brief on appeal in this Court failed to draw this Court's

attention to the Federal Fourteenth Amendment issues referred to in said motion. I likewise aver that this same inadvertence continued during the time of the proceedings in this Court on the motion to amend the remittitur as referred to in the instant motion. This latter inadvertence, i.e., the inadvertence during the proceedings on the prior motion for amendment of the remittitur occurred in a period of time when both Mr. Iovine and I were handicapped in the conduct of our office matters by protracted illness —in my own case the illness was mine personally, and in Mr. Iovine's case the illness was that of a member of his immediate family terminating in death.

3. Also, as regards the inadvertence on the part of my firm during all of the times pertinent hereto, i.e., including the inadvertence during the period of presentation of the appeal herein, and further aver: On advice of my physician I bought a home in North Miami Beach, Florida, in October, 1961. I have been under the care of a physician for upwards of two years and my health has been such that I should not be active. I have spent on the average of one month in Florida and ten days in my office in order to help carry on my firm's matters.

DAVID F. PRICE

Sworn to before me this
21st day of May 1962.

ROBERT I. WEISWASSER
Notary Public, State of New York
No. 24-4211555. Qual. in Kings Co.
Commission Expires March 30, 1963

Notice of Motion, Etc., to the Court of Appeals of State of New York

Affidavit of Joseph A. Iovine in Support of Motion for Reargument or Alternative Relief

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH GALLO,

Defendant-Appellant.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

JOSEPH A. IOVINE, being first duly sworn, deposes and says:

1. I am a member of the firm of Price & Iovine, Attorneys for Joseph Gallo, the defendant-appellant in the above entitled appeal, and the movant herein. I make this affidavit in support of said Joseph Gallo's motion for reargument or for modification clarification, and amendment (see motion and brief filed herewith).

2. I aver that, as recited in the motion herewith, it was through the inadvertence of myself and of my associate David F. Price—our firm of Price & Iovine having been the attorneys for Joseph Gallo at all times pertinent hereto—

that the several Points of argument in Joseph Gallo's brief on appeal in this Court failed to draw this Court's attention to the Federal Fourteenth Amendment issues referred to in said motion. I likewise aver that this same inadvertence continued during the time of the proceedings in this Court on the motion to amend the remittitur as referred to in the instant motion. This latter inadvertence, i.e., the inadvertence during the proceedings on the prior motion for amendment of the remittitur occurred in a period of time when both Mr. Price and I were handicapped in the conduct of our office matters by protracted illness—in Mr. Price's case the illness was his own personally, and in my own case the illness was that of a member of my immediate family terminating in death.

JOSEPH A. IOVINE

Sworn to before me this
21st day of May, 1962.

ROBERT I. WEISWASSER
Notary Public, State of New York
No. 24-4211555. Qual. in Kings Co.
Commission Expires March 30, 1963

Notice of Motion, Etc., to the Court of Appeals of State of New York

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOSEPH GALLO,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR REARGUMENT OR FOR MODIFICATION, CLARIFICATION AND AMENDMENT OF JUDGMENT AND DECISION

Statement

The above entitled appeal was decided by this Court on January 22, 1962, affirming an order of the Supreme Court, Appellate Division, Second Department, made and entered on July 5, 1961, which had in turn affirmed by a divided Court a judgment of the County Court of Kings County convicting the defendant of the crime of coercion under Penal Law §530 (535-539).*

As is recited in the Motion filed herewith, and in the affidavits in support thereof, the appellant-movant Joseph

* Citations to the record refer to the folios of the record on appeal in this Court in the above entitled appeal, unless otherwise indicated.

Gallo finds himself in the position of being obliged to make this motion for reargument or for modification and clarification owing to the inadvertence of his counsel in the appeal in this Court—the same counsel being the ones who represent Mr. Gallo on the instant Motion—in failing to draw this Court's attention to the Fourteenth Amendment of the Constitution of the United States in connection with Points I, II and IV of appellant's brief on said appeal in this Court.

ARGUMENT

Introductory

Decisions to the effect that this Court may entertain a motion for reargument on points as to which the Court's attention was "not drawn through * * * inadvertence of counsel" are, e.g., *Marine National Bank* v. *National City Bank*, 59 N. Y. 67, 73, citing *Mount* v. *Mitchell*, 32 N. Y. 702; *Fosdick* v. *Town of Hempstead*, 126 N. Y. 651.

POINT I

The motion should be granted as to the Fourteenth Amendment issue which counsel inadvertently failed to draw to the attention of this Court in connection with Point IV of appellant's brief in the appeal.

Through the inadvertence of counsel, this Court's attention was not drawn in an appropriate or effective manner to the issues presented by Point IV of the defendant-appellant's brief in the aforementioned appeal in this Court. Appellant's said Point IV related to the matter of the refusal of the Trial Court to accept proof of former jeop-

ardy, *res judicata*, and collateral estoppel in connection with certain proceedings against the appellant in Nassau County in which the appellant was acquitted under a charge of conspiracy, all of which is more fully set forth in said Point IV of appellant's aforementioned brief. Through the inadvertence of counsel, appellant's said Point IV in his brief on appeal in this Court did not refer to the Fourteenth Amendment of the Constitution of the United States and did not invoke that Amendment as a ground for reversal of the Trial Court's aforesaid refusal to accept proof of former jeopardy, etc. as above recited. This failure of counsel to invoke the Federal Fourteenth Amendment represented a failure on counsel's part to discern that in a case of asserted *state* double jeopardy (as distinct from *federal*), issues looking to a defense of double jeopardy become cognizable under the Constitution of the United States only *via* the Fourteenth Amendment of said Constitution (not through the Fifth Amendment) and that the Federal cognizability of such issues arises on the basis of tests of the general fairness of State exercise of the power of criminal prosecution in general Fourteenth Amendment terms, rather than on the specific or direct basis of any asserted State violation of any Federally guaranteed right against State double jeopardy as such.

The correct formulation of the State double jeopardy issue as it properly arises in this case in Fourteenth Amendment terms would have entailed counsel's citing and arguing to this Court the cases of *Bartkus* v. *Illinois*, 359 U. S. 121, 127; *Palko* v. *Connecticut*, 302 U. S. 349; and the concurring opinion of Mr. Justice Frankfurter in *Brock* v.

North Carolina, 344 U. S. 424, 429. In the *Bartkus* case, *supra*, the Court, citing the *Palko* case, *supra*, recognized that "at some point the cruelty of harassment by multiple prosecutions by a State would offend due process". In the *Brock* case, *supra*, Justice Frankfurter said (p. 429), "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted * * * "

While it is true that the charge on which Joseph Gallo was acquitted in Nassau County (see Point IV of appellant's brief on appeal herein, citing defendant's Exhibit D for identification fol. 362),* was for conspiracy rather than the substantive offense of violation of Penal Law §530 which is involved in the instant prosecution, it is submitted that the Fourteenth Amendment issue is nevertheless properly presented within the meaning of the *Bartkus*, *Palko* and *Brock* cases cited *supra*.

In any event, where a defendant is inconsistently convicted and acquitted, or *vice versa*, on charges of substantive crime and conspiracy, it has been authoritatively declared that the record should be closely examined for injustice. See *Manley* v. *United States*, 238 F. 2d 211, 222 (C. A. 6, 1956), where the Court, while conceding that such inconsistent verdicts standing alone would not justify reversal, went on to say:

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* Defendant's said Exhibit D for identification, and defendant's exhibits C and E for identification, which taken together present all of the record items in the Nassau County prosecution pertinent to the issues of double jeopardy, etc. urged in Point IV of appellant's brief on appeal and in this Point I in the instant brief, are being submited to the Clerk of this Court in connection with the filing of the present motion.

Notice of Motion, Etc., to the Court of Appeals of State of New York

> "* * * but, when an obviously inconsistent verdict as to different Counts * * * is returned by the jury, both the Trial Court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

It is submitted that the salutary rule of the *Manley* case, *supra*, suggests, by compelling analogy, the potentiality of a violation of Fourteenth Amendment due process whenever a defendant in State criminal proceedings is subjected to multiple or successive prosecutions for what in all true essence amounts to the same offense; and that this analogy is not less compellingly appropriate to our case merely because the inconsistent verdicts occurred in separate prosecutions for the conspiracy and substantive offenses, but that this latter circumstance renders the analogy all the more compelling by reason of the double jeopardy features of the situation.

The inadvertent failure of counsel to formulate properly the Fourteenth Amendment issue in appellant's brief on appeal in this Court was not remedied by counsel's subsequent motion for amendment of the remittitur of this Court. The purpose of said motion for amendment of the remittitur was to import into the face of the record a certification by this Court that the Fourteenth Amendment issues above described were presented and ruled upon by this Court. However, this purpose of counsel is believed not to have been accomplished by the aforesaid motion to amend the remittitur and by the granting of said motion in this Court's order of February 22, 1962.

Notice of Motion, Etc., to the Court of Appeals of State of New York

This Court's aforementioned order of February 22, 1962 read as follows:

DECISION

COURT OF APPEALS

February 22, 1962

No. 159

THE PEOPLE, &C.,

Respondent,

vs.

JOSEPH GALLO,

Appellant.

Motion to amend the remittitur granted, return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and passed upon questions under the Constitution of the United States, viz.: Appellant contends that, upon this prosecution for the crime of coercion, the trial court's refusal to accept proof of his acquittal of the crime of conspiracy in Nassau County, in support of his plea of former jeopardy, violated his constitutional rights "under the Fifth Amendment" and deprived him of due process of law under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that prior acquittal of the crime of conspiracy was not a bar to prosecution or conviction of the crime of coercion in Kings County and that there was no violation or deprivation of appellant's constitutional rights. [See 10 N. Y. 2d 1024].

Thus, while the above quoted order states that there were "presented and passed upon questions under the Constitu-

tion of the United States", the order goes on to state not that the appellant had actually presented the Fourteenth Amendment issue during the appeal, but that the "appellant *contends*" [note use of present tense] that his Fourteenth Amendment rights were violated. And the concluding sentence of the above-quoted order contains no reference to any issue as to appellant's *Federal* constitutional rights; nor does the decision of this Court referred to at the conclusion of the above quoted order, viz., "10 N. Y. 2d 1024", contain any such reference to Federal constitutional questions.

We hasten to repeat what is stated in our motion filed herewith, that this failure to formulate effectively the Fourteenth Amendment issue both in the main appeal herein and in the proceedings for amendment of the remittitur was owing solely to the inadvertence of counsel in having failed effectively to present said issue, and that this Court's response to the motion for amendment of the remittitur showed this Court's cognizance of the situation in regard to the actual posture of the Fourteenth Amendment issue.

It is in order to relieve the appellant-movant of the disadvantages which he incurred by reason of his counsel's inadvertence as aforesaid, that the present motion is brought.

Now that counsel, thanks to the advice of other counsel who were engaged to advise as to the procedure for further review of this cause in the Supreme Court of the United States, are at length in a position to perceive clearly the framework of the Fourteenth Amendment issue in regard

to appellant's aforementioned defense of State double jeopardy, etc., appellant does most respectfully move and petition this Court to relieve him of the disadvantage incurred by him, owing only to the inadvertence of his counsel, in regard to the prior failure of his said counsel to present to this Court properly and effectively the aforementioned issues of Federal constitutional right, and to relieve him also of the consequent impairment of his right to seek Federal review in the Supreme Court of the United States.

Appellant would also respectfully emphasize, that the reargument branch of this motion is being presented to this Court by no means only with a view to ultimately possible Federal review, but is being presented also in all earnestness as a bona fide application to this Court to reconsider appellant's appeal on its true legal merits irrespective of any further review proceedings which appellant might seek to pursue in the Supreme Court of the United States.

POINT II

The motion should be granted as to the Fourteenth Amendment issue which counsel inadvertently failed to draw to the attention of this Court in connection with Point I of appellant's brief in the appeal.

On the same basis set forth under the above Point I, i.e., on the same basis of the inadvertence of counsel, it is submitted that this Court's attention was not drawn in an appropriate or effective way to the issues presented by Point I of the appellant's brief in the aforementioned appeal in this Court. Appellant's said Point I in the appeal

related to the Trial Court's exclusion of a contract between the appellant and the accusing witness, by reason of which exclusion appellant urged that the crime of coercion (Penal L. § 530) was not proved against him. Through the inadvertence of counsel, appellant's said Point I in his brief on appeal in this Court did not refer to the Fourteenth Amendment of the Constitution of the United States as affording protection to the appellant against such exclusion of the aforesaid contract, i.e., appellant's brief did not urge that thereby he was denied the right of fair hearing and the right to make proper defense to a State charge of crime. This issue was not presented to this Court in appellant's aforementioned motion to amend the remittitur.

As shown in Point I of appellant's brief in the appeal in this Court, it was a question of fact for the jury, in this prosecution for coercion pursuant to Penal Law § 530, as to whether the complaining witness had a legal right to put a certain machine out of his premises. If there was a binding, existing contract which obligated the complaining witness to keep the machine in his premises, that fact was material to the question of whether the defendant was guilty of "coercing" the complaining witness "to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing" (P. L. § 530). The Trial Court's exclusion of the aforesaid contract deprived the defendant of his Fourteenth Amendment right to a fair hearing and to make proper defense to the State charge for which he was on trial. *E.g. Frisbee* v. *Collins*, 342 U. S. 519; *Williams* v. *New York*, 337 U. S. 241; *Cole* v. *Arkansas*, 333 U. S. 196.

POINT III

The motion should be granted as to the Fourteenth Amendment issue which counsel inadvertently failed to draw to the attention of this Court in connection with Point II of appellant's brief in the appeal.

Again, on the basis of the inadvertence of counsel, it is submitted that this Court's attention in the appeal herein was not drawn to the Fourteenth Amendment aspect of the issues presented by Point II of appellant's brief in the aforementioned appeal in this Court. Appellant's said Point II urged that as a matter of law the guilt of the appellant was not established beyond a reasonable doubt, and the evidence of such alleged guilt was analyzed to demonstrate that it was wholly non-probative of guilt. But for the inadvertence of counsel, appellant's said Point II would have urged that this is a case of "no evidence" of guilt such as to bring into operation the protection of the Fourteenth Amendment within the meaning of the following cases:

E.g., *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, decided by the Supreme Court of the United States December 11, 1961, 30 U. S. Law Week 4070; 80 A.L.R. 2d 1368, 1373 (citing at the latter page *People* v. *Terra*, 303 N. Y. 332, App. dism. 342 U. S. 938, for the proposition that due process requires some evidence which tends to prove the elements of the crime charged).

Notice of Motion, Etc., to the Court of Appeals of State of New York

CONCLUSION

It is respectfully submitted that the relief prayed for in the motion should be granted.

Respectfully submitted,

PRICE & IOVINE,
Attorneys for Appellant-Movant
Joseph Gallo

DAVID F. PRICE,
JOSEPH A. IOVINE,
Of Counsel.

Order Denying Rehearing
[Court of Appeals, State of New York]

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixth day of July A. D. 1962.

PRESENT, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 477

THE PEOPLE &C.,

Respondent,

vs.

JOSEPH GALLO,

Appellant.

A motion for reargument of the above cause or for alternative relief having been heretofore made upon the part of the appellant and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk

[Seal]

Opinion of Supreme Court of New York, Appellate Division, Second Department

14 A.D. 2d 556, 218 N.Y.S. 2d 1009.

PEOPLE of the State of New York, Respondent, v. JOSEPH GALLO, Appellant.

Supreme Court, Appellate Division, Second Department. July 5, 1961. Price & Iovine, Brooklyn, for appellant; David F. Price, Brooklyn, of counsel. Edward S. Silver, Dist. Atty., Brooklyn, for respondent; Wm. Sonenshine, Brooklyn, of counsel. Appeal by defendant, as limited by his brief, from a judgment of the County Court, Kings County, rendered September 9, 1960, convicting him, after a jury trial, of the crime of coercion (Penal Law, § 530), and sentencing him to serve an indeterminate term in the New York City Penitentiary. Judgment affirmed. No opinion.

UGHETTA, PETTE and BRENNAN, JJ., concur.

NOLAN, P.J., and KLEINFELD, J., dissent and vote to reverse the judgment and to grant a new trial, with the following memorandum: Defendant was convicted of having attempted by threats to intimidate one Supino with a view to compelling him to put back in his place of business a pinball or bowling machine, which he had directed his manager to remove from the premises. As part of the People's case, in proof of the alleged coercion, Supino was permitted to testify that he had no contract which required him to keep the machine in the premises; that it was up to him whether he wanted a machine; and that he had no contract which forced him to keep the machine if he did not want it. Sub-

sequently a contract, which required Supino to keep the machine in the premises, was offered in evidence by defendant. The trial court excluded such contract on the ground that it was proof of a collateral matter only, and was not material to the issue before the court. In our opinion, the exclusion of this document was error. It is unnecessary to decide whether the existence of the contract would have proved that the threats were not made to compel Supino to do an act which he had a legal right to refrain from doing, and thus would have precluded defendant's conviction. The evidence adduced as proof of the alleged coercion was obviously intended to prove that Supino had a legal right to remove the machine from his place of business because he was not required to keep it there by any contract. Hence, defendant should have been permitted to meet such proof by showing that there was such a contract.

Defendant's Exhibit E for Identification

EXCERPT FROM TESTIMONY OF STATE'S WITNESS JERRY ROBINSON IN NASSAU COUNTY CONSPIRACY TRIAL RELATING TO DEFENDANT'S SAME ALLEGED CONDUCT OF COERCION AS WAS INVOLVED IN KING'S COUNTY TRIAL FROM WHICH THE INSTANT CERTIORARI PROCEEDING ARISES.

(Pp. 3860-3861)

"*Cross Examination by Mr. Schiffer:*

Q. At the time you relate here about December of 1958 when this incident occurred at the time when Frank De. Forte came to see you from Local 266, there was no union label on that machine, was there? A. At the time?

Q. At the time there was no union label at all on the machine; was there? A. Well, I don't recall that.

Q. You never saw a union label on that machine; did you? A. I never looked.

Q. So you couldn't say whether there was or was not? A. That's right.

Q. Didn't Mr. Frank DeForte say to you when he came to see you— A. Yes.

Q. I say, did he say to you when he came to see you that all he was concerned with was the interest of 266 as a union and making sure that the machine was going to be serviced by a union man? A. Right."

Statutes and Rules of Court

THE CONSOLIDATED LAWS OF NEW YORK

PENAL LAW §530

[McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, BOOK 39, PART I, p. 312]

"§530. Coercing another person a misdemeanor

A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor."

RULES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

RULE XX

"Motions for reargument must be submitted on printed briefs (eighteen copies) without oral argument, on five days' notice to the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon. A copy of the brief shall be served on the adverse party with the notice of motion. (Amended Dec. 15, 1906: Nov. 20, 1917.)"

Defendant's Exhibit B for Identification

AUTOMATIC COIN CONTROLLED MACHINES

THIS AGREEMENT, made this 11th day of FEBRUARY 1958, by and between L & J AMUSEMENT, hereinafter referred to as the "Operator", and ROCCO SUPINO & JERRY ROBINSON, doing business as SUPINO'S BAR of 312 BEDFORD AVENUE, BROOKLYN, N. Y., hereinafter referred to as the "Proprietor".

1. The Operator leases to the Proprietor one coin operated amusement game to be installed by the Operator at the above address of the Proprietor whose signature appears below. The Operator agrees to keep the game in good repair, and the Proprietor agrees to keep the machine connected to an electric outlet in his premises and in readiness for operation during all business hours, and to furnish the necessary electric current for the operation of this machine. The Operator shall have the right to replace said game with any other legal coin operated amusement game at his discretion.

2. The proceeds from the operation of said machine shall be divided after deduction of all license fees, taxes, and prizes as follows: 65% to Operator, 35% to Proprietor, but in any event the Operator is to receive a minimum of $25.00 per week. The failure of the Operator to collect the said minimum for any period of time shall not be deemed a waiver of its right to insist upon said minimum.

3. It is understood that the machine and the contents thereof are and shall continue to be the sole property of the Operator.

Defendant's Exhibit B for Identification

4. The Proprietor agrees that during the term of this agreement the operator shall have the exclusive right to operate and maintain all legal coin operated amusement games in the Proprietor's premises.

5. This agreement shall bind the parties and their assigns, and the Proprietor agrees to notify any prospective purchaser of the existence of this agreement.

6. In the event of a breach of this agreement by the Proprietor, the parties hereto agree that the Operator shall be entitled to recover as liquidated damages, and not as a penalty or forfeiture, the damages not being readily ascertainable, a sum equal to $25.00 per week for each week remaining of the unexpired term of this agreement.

7. It is mutually agreed that the duration of this agreement shall be for a period of FIVE YEARS from the date hereof and shall renew itself automatically for like periods, at the same terms and conditions, unless either party gives to the other written notice of its intention to cancel said agreement, by registered mail, thirty (30) days prior to the expiration of this agreement or any renewal period thereof.

8. The Proprietor certifies that the business at the above address is owned by him.

Accepted:

Prop. ROCCO SUPINO
858 Metropolitan Ave.
JERRY ROBINSON
314 Bedford Ave. Bklyn.

L & J AMUSEMENT
Operator